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No. 82-5744

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DOUGLAS RAY MEEKS,

Petitioner,

v.

LOUIE L. WAINWRIGHT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE LOWER COURT ERRED IN REFUSING TO ALLOW PETITIONER TO PRESENT EVIDENCE OF ALLEGED RACIAL ATTITUDES PREVALENT IN PERRY, TAYLOR COUNTY, FLORIDA, AT THE TIME OF HIS TRIAL

II. WHETHER THE LOWER COURT ERRED IN REFUSING TO HOLD THAT ANY OF THE ALLEGED TRIAL ERRORS WERE SO FUNDAMENTAL AS TO REQUIRE A RETRIAL AS TO GUILT AND/OR SENTENCE.

III. WHETHER THE LOWER COURT ERRED IN DETERMINING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

IV. WHETHER THE LOWER COURT ERRED IN IMPLICITLY HOLDING THAT PETITIONER WAS AFFORDED AN ADEQUATE HEARING ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

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PRELIMINARY STATEMENT

The complete record on appeal as filed in the Florida Supreme Court which is the subject of this certiorari proceeding is submitted herewith and references thereto will be made by the symbol "App." followed by appropriate page number.

OPINION BELOW

The opinion of the lower court is reported as Meeks v. State, 418 So.2d 987 (Fla. 1982).

JURISDICTION

Respondent has no quarrel with the jurisdiction of this court pursuant to Title 28, U.S.C., § 1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional and statutory provisions involved as set forth on p. 1 of the petition.

STATEMENT OF THE CASE

On March 12, 1975, petitioner was convicted and sentenced to death for the murder of Lloyd Walker (lower court case No. 74-299-CF). The Florida Supreme Court affirmed, opinion reported at 399 So.2d 186 (Fla. 1976). On May 6, 1977, that court issued a Gardner[1] order directing the trial judge to state whether his sentence was based on any information not known to petitioner. On May 18, 1977, the trial judge responded that he had relied in part on a psychiatric report which had not been furnished to

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1/ Gardner v. Florida, 430 U.S. 349 (1977).

petitioner. The lower court then remanded the cause to the trial court for an evidentiary hearing on the issue, at which time it was learned that petitioner's trial counsel had been present during the examination upon which the report was based. Petitioner was afforded an opportunity to rebut the contents of the psychiatric report, but his testimony at the hearing only confirmed the report's accuracy. On November 2, 1978, the lower court reaffirmed the death sentence, 364 So.2d 461 (Fla. 1978). Petitioner then sought review of his original conviction and sentence, as well as the Gardner proceeding by a petition for writ of certiorari to this Court which was denied, 439 U.S. 991 (1978).

On June 4, 1975, petitioner was convicted and sentenced to death for the murder of Chevis Thompson (lower court case number 74-300-CF).[2] The Florida Supreme Court affirmed the conviction and sentence on July 21, 1976, opinion reported at 336 So.2d 1142 (Fla. 1976). In response to the lower court's Gardner order of May 6, 1977, the trial judge stated that his sentence had been based exclusively on information known to petitioner. On January 11, 1979, the lower court issued an order declaring this case final.

Petitioner filed motions for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure on December 11, 1979 (directed to Case No. 74-299-CF), and on December 31, 1979 (directed to case number 74-300-CF). On January 31, 1980, the trial judge denied a motion for evidentiary hearing. A second hearing was held on February 5, 1980, to determine whether a stay of execution should be granted and whether petitioner was entitled to the relief requested in his

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[2]/Lower court case numbers refer to the case number in the trial court.

Rule 3.850 motions. Pro forma orders denying relief were filed on February 5, 1980. However, an amended order dated February 8, 1980 was filed by the trial judge denying petitioner's motion for post-conviction relief in case number 74-299-CF.

On appeal to the Florida Supreme Court, Meeks v. State, 382 So.2d 673 (Fla. 1980), that court set forth the numerous grounds urged for relief in petitioner's motions for post-conviction relief and then concluded as follows:

> All except two of the foregoing issues were or could have been raised on direct appeal and therefore are foreclosed in this proceeding for collateral review. Adams v. State, 380 So.2d 423 (Fla. 1980). Henry v. State, 377 So.2d 692 (Fla. 1979); Sullivan v. State, 372 So.2d 938 (Fla. 1979). The two grounds cognizable for collateral attack here are the allegations of ineffective assistance of counsel and racial discrimination in capital sentencing (grounds 1 and 4 in both rule 3.850 motions).

Id. at 675. However, after further discussion the lower court determined that petitioner was not entitled to an evidentiary hearing respecting his contention that the Florida death penalty statute was imposed in an unconstitutionally discriminatory fashion. See also the concurring opinions of Justices Overton and Sundberg and the dissenting opinion of Justice Adkins. Meeks, 382 So.2d 676-678. The case was remanded to the trial court for a prompt evidentiary hearing on the question of ineffective assistance of counsel.

Following a plenary hearing on September 16-18, 1980, the trial judge denied relief and on appeal the Florida Supreme Court affirmed. Meeks, 418 So.2d 987 (Fla. 1982).

Preliminary Remarks

It is respondent's position that the only viable issue before this Court is that of ineffective assistance of counsel.

All other issues that petitioner seeks to raise have been foreclosed by procedural default in state courts. The defaults were not excused or waived by the Florida Supreme Court. Meeks, 382 So.2d, at 675. It is the law in this jurisdiction that any issue that could or should have been raised on direct appeal cannot serve as a ground for relief in a post-conviction proceeding. Von Eberstein v. State, 270 So.2d 444 (Fla.1st DCA 1972), on reh. granted; Johnson v. State, 364 So.2d 118 (Fla.1st DCA 1978); Williams v. State, 371 So.2d 110 (Fla.1st DCA 1978). The teaching of these cases is that matters known at the time of trial are not appropriate for collateral attack, and that collateral attack will not serve as a substitute for appeal. State v. Matera, 266 So.2d 661, 666 (Fla. 1972). Respondent relies on Engle v. Isaac, ___ U.S. ___, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982), and Wainwright v. Sykes, 433 U.S. 72 (1977).

REASONS FOR NOT GRANTING THE WRIT

1.

The Decision of the Florida Supreme Court That Petitioner Received Reasonably Effective Assistance of Counsel is Correct.

At the evidentiary hearing in Perry, Florida, on September 16-18, 1980, the claim of ineffective assistance of counsel was set against a background of testimony from persons who were never qualified on the record as an expert in the area about which they testified. Additionally, the claim of racial unrest was made based on a claimed discrimination in the disbursement of monies in the rendering of municipal and county services in Perry, Taylor County, Florida.

David Lipman was the first witness called by petitioner at the evidentiary hearing (App. 17). This witness was never qualified as an expert in anything. Presumably, the witness was

called to testify as to the disbursement of municipal and county services in Perry, Florida, and prevailing racial attitudes in that city during March and June of 1975 (App. 23, 26). The trial judge sustained the objections properly made to this type of testimony (App. 26). However, the trial judge did permit a proffer of Mr. Lipman's testimony (App. 45-65). In his proffered testimony, Mr. Lipman gave it as his opinion that Perry, Florida, is largely residentially segregated and this conclusion is based on what he referred to as segregation index demographic studies (App. 54). As a result of his studies and interviews done in Taylor County by himself or someone under his supervision, Mr. Lipman stated that it was his general impression that if you are white and you have complaints about city and county government, then the city or county will respond to your requests. However, if you are black, then the city or county either denies your requests, there is no follow-through, or rejects your request or demand (App. 60). On cross-examination, Mr. Lipman admitted that the opinions expressed were based upon the preparation made for a pending lawsuit against Taylor County and the City of Perry (App. 67). Mr. Lipman further admitted that Perry was not the only city against which he had brought law suits in behalf of black people (App. 72). In fact, he was preparing to file or had filed a suit against the City of Live Oak, Florida. A case against the City of Ft. Myers was presently on appeal (App. 73). He was involved in a suit against the City of Apopka, Florida (App. 74). Indeed, Mr. Lipman was involved in lawsuits pending against Marianna, Chipley, Quincy, Okeechobee, and Tarpon Springs, Florida. He then admitted that racism and patterns of discrimination were not confined to Taylor County, Florida (App. 75, 76).

The next witness to testify for petitioner was Gerald Shofner (App. 79). This witness was never qualified as an expert in any field of endeavor. Mr. Shofner is an author and his field

is history and political science (App. 79). Apparently, counsel for petitioner was attempting to qualify Mr. Shofner as an expert historian specializing in race relations in Florida for the purpose of having him state his opinion as to "what is behind disparities" in services in Taylor County and Perry, Florida (App. 86). An objection was lodged to this type of testimony and we think counsel aptly stated the point as follows:

> Counsel is attempting to establish that competency of counsel required one to hire a Ph.D. with expertise in race relations and hire a civil rights lawyer to do 750-850 hours of research to conclude that racism exists in this county -- that's the only reason that I can see for the testimony of either of these two witnesses having been proffered but it has no bearing to any issue before the Court.

(App. 86) The objection was sustained by the trial judge (App. 87). However, the trial judge did permit a proffer of Mr. Shofner's testimony (App. 88-92). On cross-examination, this witness admitted that he had not made any examination or study of court records for the purpose of determining whether jury verdicts in Taylor County reflected a pattern of discrimination against blacks (App. 92).

Petitioner next called Wayne David Griffin to testify in his behalf (App. 94). Mr. Griffin was a preacher but was never qualified as an expert in theology or anything else. Apparently, the thrust of this witness's testimony was that he was aware of racial tensions in Perry through his own experiences (App. 97). Interestingly, in answer to one of the questions propounded by counsel for petitioner, Mr. Griffin stated that he was not aware of any school being closed in the fall of 1974 because of racial tension (App. 100). The purpose of this witness' testimony was well stated by one of petitioner's counsel as follows:

> Our intention all along has been that one of the failings of trial counsel was not to explore the atmosphere of the community at the time.

(App. 101) This bears out the truthfulness of the state attorney's remarks hereinabove quoted. The state attorney again remarked on what petitioner was attempting to do. Note the following:

> Secondly, what we have here is not an attempt to show incompetency of counsel, what we have here is an attempt guised, thinly guised, to impeach the jury's verdict by showing that Taylor County and Perry is such a hotbed of racism that it's impossible to obtain a fair trial. Now that's what counsel has attempted here, this has nothing to do with the competency of counsel.

(App. 102)

The next witness called by petitioner was Jimmy Hunt. This witness was never qualified as an expert in anything (App. 107). Mr. Hunt is a lawyer and worked as an assistant public defender. In fact, Mr. Hunt was counsel for petitioner's codefendant Homer Lee Hardwick (App. 108). Mr. Hunt stated that there were other avenues of gaining information rather than through the taking of depositions (App. 115). Petitioner's counsel through this witness sought to show that at the time this witness deposed petitioner, petitioner's counsel, John F. Howard, was not present. Mr. Hunt admitted, however, that he did not know whether petitioner's attorney was ever given notice as to the taking of the deposition (App. 119). Mr. Hunt at no time testified that in his opinion petitioner received ineffective assistance of counsel. He did state that in certain instances things done or not done by petitioner's trial counsel could be considered as evidence of ineffectiveness. On cross-examination, Mr. Hunt admitted that the motion to dismiss the indictment filed in the Homer Lee Hardwick case was denied and that it was something of an exercise in futility (App. 125). As to his motion for change of venue filed in the Hardwick case, Mr. Hunt stated that he did not consider that the court abused its discretion in denying the motion. This was based on the answers

given by prospective jurors on their voir dire examination (App. 126). As a matter of fact, this issue was never raised on appeal in the Hardwick case (App. 126). In other words, based on responses as given, this witness was of the opinion that his client would receive a fair and impartial trial by an unbiased jury (App. 127). This witness also acknowledged that there were other means of gaining information rather than by the taking of depositions (App. 128). He admitted that there were circumstances where depositions were not absolutely essential (App. 130). Mr. Hunt on redirect examination stated that as to whether it would be prejudicial to allow in evidence a co-felon's fingerprints would depend on the case. In circumstances where defense strategy was to argue that the primary responsibility was for the codefendant, then the admission of such fingerprints would not be prejudicial (App. 135). Again, this witness never stated that it was his opinion that petitioner received ineffective assistance of counsel.

The next witness called by petitioner was Stephen N. Bernstein. This witness stated that he was a lawyer employed by the public defender's office in Gainesville, Florida (App. 142). However, he was never qualified as an expert witness. Mr. Bernstein gave a long dissertation as to what is involved in defending a capital case and what he usually does when he represents a defendant on a capital charge (App. 149-164). In the defense of a capital crime, this witness gave it as his opinion that voir dire was fifty percent of what the attorney had to do (App. 165). He stated that in reading the voir dire examination of the prospective jurors he noticed several things that were not done that he would have done (App. 166-170). Please note that the two jurors, Mr. Bowden and Mrs. McNease, on which this witness found fault with petitioner's trial counsel's voir dire examination were subsequently excused on peremptory

challenge by trial counsel (App. 169, 170). Mr. Bernstein stated that he probably would personally have asked more questions but could not state that it was ineffective assistance as it could be a strategy decision (App. 170). When asked whether petitioner's trial counsel's alleged faulty voir dire examination of the prospective jurors constituted ineffective assistance of counsel, this witness answered that it would, indirectly (App. 171, line 8). Next, the testimony of this witness was proffered as to how he would be affected upon learning that the city and county governments in Perry, Florida, were discriminating to the disadvantage of black people. Then followed a long series of questions and answers designed to bring out just how this witness would be affected by such information in his trial of a capital case (App. 178-183). Interestingly, when asked if there could be any strategy reasons for not using all of the peremptory challenges in a capital trial, this witness answered that there could always be strategic reasons for not doing that (App. 189, 190). The witness was next asked twice whether he would consider it evidence of ineffectiveness not to exercise more challenges or to require further regarding challenges (App. 190, 191). Please note, the witness would not state that he considered it even an indication of ineffective assistance of counsel but only that in his opinion it was an indication that petitioner's trial attorney did not give a great deal of thought to the area of possible community prejudice (App. 191). The witness was next asked if he had formed an opinion from reading the transcript of the voir dire examination as to whether it was an effective voir dire examination. The witness replied that he would have to say that it was "inadequate." (App. 194) The witness finally gave it as his opinion that petitioner's trial counsel gave ineffective assistance to petitioner during the penalty phase of the trial (App. 206-208). On cross-examination, this witness admitted that the record of the voir dire examination did not include such

things as consultation with the client. He admitted that the record of the voir dire examination did not include the personal knowledge of the jurors or even the venire (App. 214). When asked whether the question of the codefendant's fingerprints could be a question of trial strategy or trial tactics, the witness replied that it certainly could (App. 215). The witness admitted that there were other valid and effective means of discovery other than by deposition (App. 219). The witness frankly admitted that in the trial of cases, a trial lawyer could look back and second-guess on a number of things (App. 222). Mr. Bernstein was, of course, opposed to the imposition of death as punishment (App. 224).

The next witness called by petitioner was Craig Barnard who is a lawyer and assistant public defender in West Palm Beach, Florida (App. 237). Mr. Barnard was never qualified as an expert witness. This witness was not too sure about anything. His remarks were usually prefaced by the words, "I think" (App. 243), or qualified by the words, "very difficult to judge." (App. 244, line 7). See also his answer to the question of whether or not the failure to pursue a remedy would be evidence of ineffective assistance of counsel (App. 250, line 11). In answer to another question propounded to him, the witness remarked as follows: "That indicates to me, I would not say that is ineffective per se, I would not say that, ..." (App. 256, lines 14, 15) Again, in answer to a question propounded to him, this witness remarked: "I would not say failure to object to those portions are ineffective per se, ..." (App. 258, lines 13, 14) However, Mr. Barnard did conclude by saying that in his opinion petitioner did receive ineffective assistance of counsel during the penalty phase of his trial (App. 262). It is understandable why there was no attempt to qualify Mr. Barnard as an expert in the trial of capital cases. On cross-examination when asked how

many capital cases he had tried, the reply was, "none." (App. 273, line 4) Mr. Barnard was frank enough to admit that as an appellate attorney he could take a trial transcript and virtually pick it apart (App. 275).

David Mack was next called to testify on behalf of petitioner. This witness was not qualified as an expert in anything (App. 286). Apparently the purpose of calling this witness was to have him testify that discrimination based on race still exists in Perry, Florida. Objections to this type of testimony were sustained and his testimony was received on proffer (App. 303-308).

The next witness called by petitioner was Jeff Smith. Mr. Smith simply testified that he had worked with the prior witness, David Mack (App. 310-312).

The first witness called by respondent at the evidentiary hearing was John Weed. Mr. Weed stated that he was an attorney and that a significant portion of his practice consisted of criminal cases (App. 315, 316). He was tendered as an expert in the field of criminal trial practice and counsel for petitioner had no objection to his expertise in this area (App. 317). Mr. Weed testified that he had read the trial transcript in the case of Douglas Ray Meeks, this would be the first trial, and that as a result thereof he gave it as his opinion that petitioner's trial counsel rendered petitioner reasonably effective assistance (App. 325). This was Mr. Weed's opinion in spite of the fact that he was personally opposed to the death penalty (App. 328).

The next witness called by respondent was Martin S. Page, an attorney who had been practicing a little more than sixteen years (App. 336). After eliciting his qualifications, he was tendered as an expert in the field of criminal trial practice (App. 338). The trial judge found that the witness was qualified

and entitled to give testimony as an expert witness (App. 239).

Please note the following quoted from the record:

> Q: Mr. Page, at the request of the office of the State Attorney, have you read the trial transcripts in the case of Bar [sic], the State of Florida versus Douglas Ray Meeks?
>
> A: Yes.
>
> Q: Looking at the record as a whole, based on the State's case and the evidence presented and the apparent defenses or the lack of defenses available, what is your opinion as to the effectiveness of trial counsel?
>
> A: Well, if I might qualify my view, I think I have already expressed to you, I'm not quite sure what is understood by effectiveness. I equate it to competence, I guess, and I would say it was a transcript as I read it in both cases, I would say a reasonably competent job. Q: Do you feel that the trial attorney in this particular case did an adequate job of preserving objections for appeal?
>
> A: Yes, those points I saw that might be questionable I think he did.
>
> Q: Did you note in either trial, any particular aspect which you would consider as clear evidence of incompetency on the part of the defense counsel?
>
> A: No sir.
>
> * * * * *
>
> Q: Mr. Page, assuming any defense counsel you know handled the case of State versus Douglas Ray Meeks case 299, do you have an opinion of whether or not that result would have been the same?
>
> A: Yes, I have an opinion.
>
> Q: And what is that opinion sir?
>
> A: It would be highly probable that a coviction could have resulted.

(App. 339, 340, 342)

Elizabeth Bell was called to testify in behalf of petitioner. She was qualified as an expert in child development (App. 355). An objection to this witness's testimony on the ground of relevancy was sustained by the trial judge (App.

362). This witness's testimony was then elicited on proffer (App. 364-387). The thrust of her testimony on proffer was that petitioner was an impressionable person (App. 379) and that he was susceptible to being led by a more dominant person (App. 380, 381). However, on cross-examination it was brought out that the first time this witness had ever physically met petitioner was that very morning (App. 382). At the conclusion of this witness's testimony, the assistant state attorney, Mr. Bean, announced that petitioner's trial counsel, Mr. Howard, was available to testify and could be called if petitioner so desired. Petitioner decided not to call Mr. Howard to testify in his behalf (App. 388, 389). Since the burden of proof is on petitioner at an evidentiary hearing, the strategy of this decision escapes respondent.

The next witness called by respondent was Virlyn Willis, an attorney who was qualified as an expert in the field of criminal trial practice (App. 390, 395). Mr. Willis gave it as his expert opinion that John Howard did give petitioner reasonably effective assistance of counsel. Note the following:

> Q: All right, sir, in your opinion as a prosecuting attorney in the Meeks' cases and as an expert in the field of criminal trial practice, did Mr. John Howard, the trial counsel for defendant Meeks, reasonably, give Mr. Meeks reasonably effective representation?
>
> A: Yes. Q: Can you recall any particular point in either trial which you would consider as clear evidence of incompetency on the part of defense counsel?
>
> A: No.

(App. 396)

Jimmy Hunt was recalled as a witness for petitioner (App. 437). On cross-examination, Mr. Hunt was asked if he had an opinion as to the reason for the difference between the sentences imposed on Meeks and on his codefendant, Hardwick. He answered as follows:

> A: I thought that throughout that Meeks case was different, that Meeks was the more culpable between the two - the evidence indicated - Meeks was in control throughout the commission of this crime. The testimony was that he was the one that gave the directions to Dianne, I don't recall her last name, the Clerk, and the deceased, Lloyd Walker to go back to the store.
>
> He was the one that had the gun in his hand throughout, Hardwick never said anything, and the last time that Dianne, the only witness alive to testify that had actually saw the gun in Meeks' hand, and strong reason to believe, that he fired the fatal shots.

(App. 441) In weighing the comments of Mr. Hunt, it should be remembered that he was counsel for petitioner's codefendant and was thoroughly familiar with the facts of the case.

Following the evidentiary hearing, the trial judge by order dated October 22, 1980, found that petitioner received reasonably effective assistance of counsel at trial and on appeal and consequently denied the motion to vacate judgment and sentence in Case Nos. 74-299-CF and 74-300-CF (APp. 37-39). On appeal, the Florida Supreme Court affirmed. Meeks v. State, 418 So.2d 987 (Fla. 1982).

At the evidentiary hearing before the trial court, counsel for petitioner sought to compare the result reached in the Hardwick case (life imprisonment) with that of petitioner (death penalty) on the basis that Hardwick received effective assistance of counsel, whereas petitioner did not. The Florida Supreme Court spoke to this precise issue and we quote the following:

> We are extremely sensitive to the demands of equality before the law in cases in which we must consider whether a sentence of death should be upheld. . . . But there was evidence, discussed above, from which the jury in Hardwick's trial could have concluded that Meeks was the dominant figure in this criminal episode. . . . The presence of such testimony, accompanied by Hardwick's youth, sufficiently differentiates the cases of the two men so that Furman's dictates are not violated by the imposition of different penalties.

339 So.2d, at 192.

In contemplating the services rendered by Mr. Howard in behalf of petitioner, one really begins to wonder just what degree of expertise is necessary on the part of defense counsel in order to withstand the charge of ineffective assistance. Without risk of exaggeration, respondent states that when this charge is viewed in the light of what Mr. Howard actually did in representing petitioner, it becomes an absurdity. Frankly, the charge is so ridiculous that the necessity of refuting same lends it an undeserved dignity.

The standard for constitutionally effective assistance of counsel is "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974)(quoting MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), adhered to in pertinent part on rehearing en banc, 289 F.2d 928 (5th Cir.), cert.denied, 368 U.S. 877 (1961). The stating of the correct rule is relatively easy; the difficulty arises in the application of the facts to the rule in order to determine the issue of reasonably effective assistance of counsel. We think that Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), correctly teaches that reasonably effective assistance must be judged from the perspective of counsel, taking into account all the circumstances of the case, but only as those circumstances were known to him at the time in question. Viewing matters from the perspective of trial counsel, it is good to appreciate that the presumption is that counsel rendered effective assistance and to overcome that presumption on collateral attack, petittioner must shoulder a heavy burden. Catches v. United States, 582 F.2d 453 (8th Cir. 1978); Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976), cert.denied, 492 U.S. 1053. When this presumption is viewed against the background of Mr. Howard's representation of

petitioner, it literally precludes petitioner's claim of ineffective assistance.

A defendant has the right to reasonably effective assistance of counsel but he does not by any stretch of the imagination have the right to errorless counsel. United States v. White, 524 F.2d 1249 (5th Cir. 1975); cf. Tollett v. Henderson, 411 U.S. 259 (1973). Certainly, mere mistakes in judgment or even failure to recognize and investigate certain defenses does not necessitate a new trial, Tollett v. Henderson, supra, and a court should not measure the competency of counsel's advice by retrospectively considering whether it was right or wrong, but should confine the inquiry to the question of whether counsel's representation was within the range of competence demanded of attorneys in criminal cases. McMann v. Richardson, 390 U.S. 759 (1970). We think these principles have been rather neatly summed up by the Eighth Circuit in Johnson v. United States, 506 F.2d 640 (8th Cir. 1974), cert.denied, 420 U.S. 978 (1975), where it said:

> The term "effective," in its most general application, describes something which ultimately achieves a desired result. With reference to professional representation in criminal cases, that might be interpreted to mean achieving only outright acquittal of the defendant on the charges without regard to the weight and strength of the evidence adduced. A more appropriate nomenclature for the standard would be to test for the degree of competence prevailing among those licensed to practice before the bar. The standard would refer more precisely to the professional competence of one who has completed a long and arduous course of study for a professional license, and who has acquired some experience in applying legal principles and conducting court trials.
>
> The professional standard could be said to include the responsibility to insure that the client is tried according to the applicable rules of evidence and practice and to urge such arguments on a client's behalf as are indicated by the evidence, or lack of evidence, adduced. It is not,

> however, constitutionally limited to an "effective" type of representation that would achieve acquittal of a defendant on any charge regardless of the facts. The constitutional provision includes neither "effective" nor "adequate" nor other adjectival terms in its guarantee of assistance of counsel. It merely states in plain language that "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defense." U.S. Const.Amend. VI.

Id. at 646. (Footnotes omitted.)

Neither should petitioner be heard to argue that the standard for effective assistance in capital cases is greater than in noncapital cases. It is submitted that in neither capital nor noncapital cases is a defendant entitled to perfect or error free representation. The number, nature, and seriousness of the charges against the defendant are all part of the totality of circumstances in the entire record that must be considered in the effective assistance calculus, just as are the strength of the prosecution's case and the strength and complexity of the defendant's possible defenses. Nonetheless, while the facts that must be considered will differ in each and every case, the legal standards for constitutionally effective assistance of counsel are constant. Washington v. Watkins, 655 F.2d 1346 1357 (5th Cir. 1981), cert.denied, 102 S.Ct. 2021 (1982). It is inconceivable that the effectiveness of counsel would require an imaginative assertion of every possible theory of defense or mitigation which might in the unpredictable future turn out to be accepted by some court, some day, in some case. Respondent submits that the adequacy of representation which petitioner received should be decided on an evaluation of services rendered in his behalf. This is so because a retrospective examination of a lawyer's representation for the purpose of determining whether same was free from error would surely exact a higher measure of competency than the prevailing standard. McMann v. Richardson, supra.

It is believed that the position of the Fifth Circuit is particularly well stated in Williams v. Beto, 354 F.2d 698 (5th Cir. 1965), as follows:

> Moreover, the fact that some other lawyer followed a different course in another case, or would have done differently had he been acting as counsel, is no ground for branding the appointed attorney with the opprobrium of ineffectiveness, or infidelity, or incompetency. The practice of law is an art as well as a science. As no two men can be exactly alike in the practice of the profession, it is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight. Scott v. United States, (6 Cir., 1964), 334 F.2d 72, cert. den. 379 U.S. 842, 85 S.Ct. 81, 13 L.Ed.2d 48.
>
> Court appointed counsel is no different to any other lawyer. He is still a lawyer, he is still practicing law, and he is no less confronted by difficult decisions of tactics and strategy. He cannot stand still and do nothing. That indeed might be the best evidence of incompetency, or infidelity, or ineffectiveness, or all three. He must decide as his knowledge, experience, and talents best permit, and then move ahead. When he does this, that is all any lawyer can do, and the client has no right to complain of the absence of a miracle. Hickock v. Crouse, (10 Cir., 1964), 334 F.2d 95, cert.den. 379 U.S. 982, 85 S.Ct. 689, 13 L.Ed.2d 572, and Smith v. Crouse, 379 U.S. 982, 85 S.Ct. 690, 13 L.Ed.2d 572, reh.den. two cases, 380 U.S. 928, 85 S.Ct. 908, 13 L.Ed.2d 817.

Id. at 706.

In determining whether petitioner has been provided with reasonably effective assistance of counsel, it is believed that the decision in United States v. Decoster, 624 F.2d 196 (D.C.Cir. 1979), en banc, provides informative guidance. There, the District of Columbia Circuit remarked in pertinent part as follows:

> A shortfall by defense counsel that is perceptible but is modest rather than egregious is no basis for judicial interposition--as appears from Agurs, Bruce, Saferian and the other cases cited.
>
> * * * * *

> In the absence of a governmental impediment to effective assistance of counsel, the court cannot lightly vacate a conviction on the basis of its own appraisal of the performance of defense counsel. The door is open, but only for cases of grievous deficiency and where the court has serious misgivings that justice has not been done. Our adversary system will be tortured out of shape if defense counsel must contemplate from the beginning that the judge will subsequently retrace his conversations with his client, and his evolving perceptions of the problems and possibilities presented by the assignment.

Id. at 208, 214.

In the final analysis, the law does not require that a defendant receive a perfect trial, but only a fair one. Michigan v. Tucker, 417 U.S. 433 (1974). The perspective from which a claim of ineffective assistance is to be evaluated is whether counsel's representation falls below the constitutionally minimum level. This ultimate question is not whether the representation was zealous or might have been better. Pollinzi v. Estelle, 628 F.2d 417 (5th Cir. 1980); United States v. Garcia, 625 F.2d 162 (7th Cir. 1980); Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980), en banc; Herring v. Estelle, supra. It is not enough to find that counsel's action did not satisfy abstract norms or satisfy a checklist of general standards which are suggested as "should normally be dones." "Below the minimum level" must mean just that. It does not mean below the average. For, to be below average would mean that counsel, by definition, would not satisfy the constitutional standard half of the time. United States v. Decoster, supra; Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), en banc. With these thoughts in mind, respondent believes that the following quoted from the opinion in Jones v. Estelle, 632 F.2d 490 (5th Cir. 1980), is an appropriate note on which to bring this brief to a close:

> We decline to evaluate the propriety of trial counsel's actions with the aid of the refractive correction of hindsight.

Id. at 492.

CONCLUSION

The Florida Supreme Court quoting from Knight v. State, 394 So.2d 997 (Fla. 1981), remarked that: "The defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." Meeks, 418 So.2d, at 989.

The petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief in Opposition to Mr. Stephen Stitt, Attorney at Law, 86 Bay Drive, Key West, Florida 33040, by U.S. Mail, this 15th day of December 1982.

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of Counsel